

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DAVID OSTER, et al.,

Plaintiffs,

v.

WILL LIGHTBOURNE, Director of the
California Department of Social
Services; TOBY DOUGLAS, Director
of the California Department of
Health Care Services; CALIFORNIA
DEPARTMENT OF HEALTH CARE
SERVICES; and CALIFORNIA
DEPARTMENT OF SOCIAL SERVICES,

Defendants.

No. C 09-4668 CW

ORDER GRANTING
PLAINTIFFS'
REQUEST FOR A
PRELIMINARY
INJUNCTION
(Docket No. 328)

This case concerns the validity of ABX4 4, a law passed in July 2009 that tightens the eligibility criteria for participants in California's In-Home Supportive Services (IHSS) Program, and SB 73, a more recently enacted law that also aims to cut the IHSS program, although in a different way. Plaintiffs are IHSS recipients, and unions that represent IHSS providers. On October 19, 2009, this Court entered a preliminary injunction to block implementation of ABX4 4, followed on October 23, 2009 by a written opinion explaining the grounds for the injunction. On December 1, 2011, Plaintiffs moved for a temporary restraining order and a preliminary injunction barring implementation of SB

1 73. Having considered all of the parties' submissions and oral
2 argument, the Court grants Plaintiffs' request for a second
3 preliminary injunction.

4 BACKGROUND

5 The Court's 2009 opinion provides a detailed explanation of
6 the facts underlying this action. The present order briefly
7 summarizes the facts relevant to the pending request for a
8 preliminary injunction.
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10 The IHSS program is part of California's Medi-Cal program,
11 which provides medical services to eligible beneficiaries and is
12 supported through a combination of state, federal and county
13 funding. Federal funds are provided through the Medicaid Act.
14 The IHSS program provides supportive services to the "aged, blind,
15 or disabled persons . . . who are unable to perform the services
16 themselves and who cannot safely remain in their homes or abodes
17 of their own choosing unless these services are provided." Cal.
18 Welf. & Inst. Code § 12300(a). At the time the present motion was
19 filed, there were 440,000 IHSS recipients. Approximately sixty
20 percent of IHSS recipients are senior citizens.
21

22 The Manual of Policies and Procedures (MPP) for Defendant
23 California Department of Social Services (CDSS) requires
24 "assistance to those eligible aged, blind and disabled individuals
25 who are unable to remain safely in their own homes without this
26 assistance." MPP § 30-700.1. The MPP also states that a
27 particular service will not be authorized unless the social worker
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1 evaluating the individual "has determined that the recipient would
2 not be able to remain safely in his/her own home without IHSS" and
3 "[p]erformance of the service by the recipient would constitute
4 such a threat to his/her health/safety that he/she would be unable
5 to remain in his/her own home." Id. § 30-761.13-14.

6 Prior to the enactment of ABX4 4 and SB 73, the CDSS had
7 developed and implemented a Uniformity Assessment System to ensure
8 that IHSS recipients with comparable needs for assistance receive
9 comparable services. The tool defined ranks of one to five for
10 social workers to use in rating elderly or disabled individuals'
11 functional abilities in fourteen areas: housework; laundry;
12 shopping and errands; meal preparation and clean up; mobility
13 inside the residence; bathing and grooming; dressing; bowel,
14 bladder and menstrual care; transfer from one position to another;
15 eating; respiration; memory; orientation; and judgment. The
16 parties refer to the rating for each category as a "functional
17 rank." Rank one, the highest functional level, indicates that a
18 recipient is able to function independently in that category,
19 without human assistance although perhaps with difficulty. Rank
20 two applies if a recipient is able to perform the function, but
21 needs verbal assistance, such as reminders. Ranks three and four
22 apply if a recipient can perform the function with some or
23 substantial human assistance, respectively, including but not
24 limited to direct physical assistance. Rank five is applied to a
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1 recipient who cannot perform the function, with or without human
2 assistance.

3 Social workers are required to assess each recipient's
4 functional rank in the fourteen areas on an individualized basis,
5 only for the purpose of determining with uniformity the number of
6 hours of a particular service a recipient needs. Time guidelines
7 are provided for each rank for tasks for which IHSS recipients may
8 receive services. Once it is determined that an IHSS recipients
9 needs a given service to remain safely at home, the number of IHSS
10 hours authorized is determined by the guidelines, unless there is
11 a documented reason for an exception. MPP § 30-757.1(a)(6).

12
13 Nonetheless, the eligibility restrictions implementing ABX4 4
14 were based on those functional ranks, as well as on a Functional
15 Index (FI) Score, a composite score calculated based on a weighted
16 average of eleven of the recipient's functional rankings,
17 excluding the rankings for the mental tasks of memory, orientation
18 and judgment. As explained in the 2009 order enjoining
19 implementation of ABX4 4, neither functional ranks nor the
20 Functional Index had ever been used to determine IHSS eligibility.
21

22 On June 30, 2011, SB 73 enacted California Welfare and
23 Institutions Code section 12301.07, mandating that the CDSS reduce
24 authorized hours of services for IHSS recipients by twenty percent
25 if, by December 15, 2011, it were forecasted that certain specific
26 revenue targets would not be met. On November 29, 2011, after it
27 appeared that the revenue targets would not be met, triggering the
28

1 cuts to the IHSS program, the CDSS issued an All-County Letter
2 (ACL) to inform counties of the requirements under new section
3 12301.07 and its plan for implementation of the SB 73 mandated
4 cuts. Declaration of Eileen Carroll, Ex. A.

5 The implementation plan for SB 73 established in the ACL is
6 as follows. Certain groups of recipients are exempted from the
7 twenty percent reductions. The reduction would not be applied to
8 "individuals receiving IHSS who also receive services under one of
9 the State Home and Community Based Services Waivers, including the
10 following: Acquired Immune Deficiency Syndrome (AIDS) Waiver, Home
11 and Community Based Services Waiver for the Developmentally
12 Disabled (HCBS-DD), In-Home Operations (IHO), Multipurpose Senior
13 Services Program (MSSP), and Nursing Facility/Acute Hospital
14 (NF/AH)." ACL at 2. These exemptions appear to implement section
15 12301.07(a)(5), which states that the reduction in IHSS hours
16 "shall not apply to in-home support services recipients who also
17 receive services under Section 9560, subdivision (t) of Section
18 14132, and Section 14132.99." Over a thousand individuals are on
19 waiting lists for these programs, but they would not be exempted.¹

20 The ACL also announced that recipients who met one of the
21 following criteria were pre-approved for an exemption from the
22 reduction: (1) if the recipient had a functional rank of five for
23 mobility inside; bowel, bladder and menstrual care; transfer, or
24

25 ¹ Plaintiffs' unopposed Third Request for Judicial Notice is
26 granted with respect to Exhibits 11 and 12.
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1 paramedical services authorized for bed sore care; and eating;
2 (2) the recipient was authorized for 283 hours per month, the
3 statutory maximum; or (3) the recipient was assessed for
4 protective supervision. ACL at 3-4. Section 12301.07(b) requires
5 the CDSS and counties to develop a process to allow counties to
6 "preapprove IHSS Care Supplements described in subdivision (f), to
7 the extent that the process is permissible under federal law."
8

9 The ACL explains that the CDSS will identify, through its
10 Case Management Information and Payrolling System (CMIPS), all
11 recipients in the exempt groups, under section 12301.7(a)(5), and
12 the groups pre-approved for an exemption to the twenty percent
13 reduction, pursuant to section 12301.07(b). ACL at 3. The exempt
14 and pre-approved recipients would receive an "IHSS Program Notice
15 to Recipient of Exemption from Reduction in Service Hours." All
16 other recipients, who would be subject to the reduction, would
17 receive a notice of action advising them of the reduction. ACL at
18 3.
19

20 The ACL sets forth a process by which recipients who receive a
21 notice of action may request a restoration of all or part of their
22 reduced hours by submitting an application for the Care Supplement
23 that SB 73 provided. The Supplemental Care application requires a
24 recipient to provide a written explanation of "how the 20-percent
25 reduction in your authorized service hours would put you at serious
26 risk of out-of-home placement." Carroll Dec. at 18. See also,
27 Cal. Welf. & Inst. Code § 12301.07(f). Section 12301.07(c) further
28

1 states, "The notice of action informing each recipient who is not
2 preapproved for an IHSS Care Supplement pursuant to subdivision (b)
3 shall be mailed at least 15 days prior to the reduction."

4 If a recipient submits the Supplemental Care application to
5 the county within fifteen days of receipt of the notice of action,
6 the county shall reinstate the reduced hours pending its
7 determination of whether the recipient would be at serious risk of
8 out-of-home placement as a result of the reduction. ACL at 6. If
9 the recipient submits the Supplemental Care application more than
10 fifteen days after the recipient receives the notice of action, the
11 reduction is imposed while the county makes its determination. Id.

12 When the county receives a completed application for IHSS
13 Supplemental Care, a worker is required to complete a Supplemental
14 Care Worksheet to decide if the applicant qualifies. The
15 worksheet purports to determine whether the recipient is "at
16 serious risk of out-of-home placement" as a result of the twenty
17 percent reduction. Carroll Dec. at 20, Supplemental Care
18 Worksheet, ACL at Attachment H. Parts A and B of the worksheet
19 outline two different tests to determine whether a recipient has
20 met the standard. Under Part A, a recipient qualifies as being at
21 serious risk if three or more of the following categories are
22 satisfied.
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24

- 25 1. Paramedical Services authorized to monitor medical
26 condition and/or give injections
- 27 2. Ranked 4 or 5 for Mobility Inside
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1 3. Ranked 4 or 5 for Bathing and Grooming

2 4. Ranked 4 or 5 for Dressing

3 5. Ranked 3, 4 or 5 for Bowel, Bladder and Menstrual
4 Care, or Paramedical Services authorized for catheter
or colostomy care

5 6. Ranked 4 or 5 for Transfer or Paramedical Services
6 authorized for bed sore care

7 7. Ranked 3, 4 or 5 for Eating

8 8. Ranked 5 for Respiration

9 Id.

10 Alternatively, under Part B of the worksheet, a recipient
11 qualifies as being at serious risk of out-of-home placement if the
12 functional ranks in the categories of memory, orientation and
13 judgment total seven or more. Id. In contrast to the exempt and
14 pre-approved groups, even recipients who are presumptively
15 eligible for a restoration of hours based on Part A or B of the
16 worksheet will receive notice and a reduction of their service
17 hours.
18

19 The next portion of the worksheet, Part C, is titled, "IHSS
20 Supplemental Care Request Disposition." Id. Importantly, Part C
21 may only be completed "if recipient/applicant is determined to be
22 at serious risk" of out-of-home placement based on Part A or B.
23 Part C requires the worker to note that the recipient is
24 nonetheless not at serious risk for out-of-home placement because
25 the recipient has changed "the assignment of tasks," has
26 alternative resources to provide specified essential services, or
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1 has had the number of hours partially or fully restored. Id. The
2 ACL explains that by changing the assignment of tasks, the use of
3 IHSS hours is prioritized for "the most essential tasks." ACL at
4 7. However, it is not explained how eliminating the hours for
5 lower priority tasks will alleviate the risk, if even the lower
6 priority tasks are necessary to ensure that the recipient is able
7 to remain safely at home.

8
9 Notice of the reduction and the Supplemental Care application
10 process, as described in the ACL, consists of the following mailed
11 items: (1) a one page notice of action, consisting of a single
12 paragraph, (2) a letter intended to explain the reason for the
13 cuts and to inform recipients of their option to seek a
14 restoration of hours through the Supplemental Care application
15 process, (3) the Supplemental Care application and, (4) a form to
16 request a state hearing.

17
18 The CDSS has drafted four different versions of the notice of
19 action to account for factors that are not relevant here. All
20 versions of the notice of action include the following language:

21 Because of a new state law, your total monthly
22 authorized hours will be reduced by twenty-percent from
23 ###.## to ###.##. (W&IC section 12301.07). See insert
for information about the new law.

24 ACL at 10.

25 The explanation letter is printed in Arial, a non-serif font,
26 with a font size of less than 14 point. The letter states,
27
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PLEASE READ THIS NOTICE CAREFULLY
IT PROVIDES IMPORTANT INFORMATION ABOUT YOUR IHSS

Beginning January 1, 2012, the total authorized monthly service hours you get will be reduced by 20-percent. Here's why:

There is a new state law (Welfare and Institutions Code section 12301.07) that requires the California Department of Social Services to make a 20-percent reduction in each IHSS recipient's total authorized monthly service hours. The enclosed Notice of Action shows how many authorized monthly service hours you get now and how many you will get after the reduction.

The 20-percent reduction is in addition to the 3.6-percent reduction in your authorized monthly service hours that took effect February 1, 2011, and which will continue until June 30, 2012.

You can decide which of your authorized services will be reduced. You can choose to reduce all of the hours from one authorized service or you can split it up among several different authorized services. Your provider(s) will receive notification about the 20-percent reduction on his/her timesheet(s). However, you are responsible for telling your provider(s) which specific service hours you have chosen to reduce. You do not have to tell the county how you have chosen to apply the reduction; this is between you and your provider(s).

If you believe that the 20-percent reduction in your authorized service hours puts you at serious risk of out-of-home placement, you can ask for IHSS Supplemental Care. You must complete the enclosed IHSS Application for Supplemental Care (SOC 877) and return it to the county by March 1, 2012. The county will review your application and determine whether you are at serious risk of out-of-home placement. If the county determines that you are at serious risk of out-of-home placement, your service hours may be partially or fully restored.

If you ask for IHSS Supplemental Care within 15 days of receiving this notice or mail it to the county postmarked no later than **January 3, 2012**, the reduction in your service hours will not go into effect and you will continue to get the same number of authorized service hours you have been getting until the county determines if you are at serious risk of out-of-home placement. If the county determines that you are at serious risk of out-of-home placement, your service hours may not be reduced at all or they may be reduced less than 20-percent.

The county will send you a notice telling you if your application for IHSS Supplemental Care has been approved or

1 denied. If you disagree with the county's decision, you can
2 request a state hearing on that decision. Information about
3 your hearing rights is included on the back of this notice.
4 However, requests for a state hearing only to dispute the
5 new state law requiring the 20-percent reduction in
6 authorized service hours will be dismissed.

7 If you do not understand the information in this notice or
8 you have any questions, contact your county IHSS office.

9 ACL Attachment A (TEMP 2257) (emphasis in original).

10 The notices and forms are to be translated into Armenian,
11 Chinese and Spanish. ACL at 4. The ACL notes that each county is
12 required generally to provide bilingual/interpretive services and
13 written translations to non-English or limited-English proficient
14 populations, as mandated by the Dymally Alatorre Bilingual
15 Services Act, Government Code section 7290 et seq., and by state
16 regulation, MPP Division 20, section 115. However, these mandates
17 do not prescribe specific requirements as to how each county is to
18 provide such assistance in the course of implementing the
19 reductions under SB 73 or how IHSS recipients are to be informed
20 of the availability of such assistance. The ACL does not provide
21 for notification targeted to reach IHSS recipients who are
22 visually impaired, cannot read or have mental impairments that
23 thwart their ability to understand and respond to the notice.

24 Plaintiffs have submitted extensive evidence relevant to
25 their likelihood of success on the merits and the irreparable harm
26 to class members. Testimony by Charles Thurman and Helen Polly
27 Stern is indicative of class members' vulnerabilities based on the
28 service cuts.

1 Charles Thurman is a seventy-one year old resident of Shasta
2 County who has received IHSS since 2006. Mr. Thurman, who was
3 born blind, has had diabetes for several years, resulting in
4 numbness, known as neuropathy, in his hands and feet. He has
5 Chronic Obstructive Pulmonary Disease, a condition that
6 contributes to weakness and shortness of breath. Mr. Thurman has
7 coronary heart disease and high blood pressure, and has had four
8 stents put in his coronary arteries to help blood circulate in his
9 body. Finally, flattened discs and damaged vertebrae in Mr.
10 Thurman's back cause difficulty and pain in reaching, grasping,
11 lifting and standing for prolonged periods of time. Mr. Thurman
12 can only walk a few steps and is at risk for falls. Outside he
13 uses an electric wheelchair.
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15 Mr. Thurman has fallen twice during the past year. Once, he
16 broke his arm and toe. The second time, he fell down on the front
17 patio while he was trying to get out of his wheelchair. Mr.
18 Thurman's wife had to call 911 for assistance in lifting him up.
19 The numbness in Mr. Thurman's hands impedes his ability to shave
20 safely and properly groom himself. He is also unable to cook and
21 clean extensively.
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23 Mr. Thurman's wife is sixty-five, cannot read, and is also
24 disabled, having suffered several small heart attacks and endured
25 a quadruple heart bypass. She is unable to lift items weighing
26 more than five pounds and cannot lift her arms over her head
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1 without risking a heart attack. Mrs. Thurman is also an IHSS
2 recipient.

3 Mr. and Mrs. Thurman share a single IHSS care provider who
4 provides a number of services which help them continue to live
5 independently in their mobile home. The provider handles domestic
6 chores, including cooking, cleaning and laundry, assists Mr.
7 Thurman with grooming, and takes the couple to their doctors'
8 appointments, shopping and on other errands. Mr. Thurman
9 currently receives 31.17 hours of IHSS care per month. If his
10 IHSS hours are cut by twenty percent, he will lose 6.23 hours. As
11 it is, the provider struggles to carry out all of the required
12 assistance in the time period allotted. On occasion, the provider
13 has had to postpone grocery shopping or leave certain domestic
14 tasks incomplete due to the lack of time. As a result, Mr. and
15 Mrs. Thurman have gone without fresh food and relied upon less
16 nutritious microwaveable meals. In addition, a dustier, dirtier
17 home exacerbates their pulmonary problems. They are at risk of
18 falling as they try to take on certain tasks to make up for the
19 lack of IHSS assistance.
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22 Helen Polly Stern is eighty-six years old, and has received
23 IHSS since 2009. Ms. Stern is physically disabled. She has
24 bilateral hip dysplasia, which is the deformation of the hip
25 joints, as well as osteoarthritis and osteoporosis. The limbs on
26 the right side of her body are shorter than the limbs on her left
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1 side. Ms. Stern has undergone numerous operations to treat this
2 condition.

3 Ms. Stern also suffers from cardiovascular, skin and bladder
4 problems. When she was fifty-eight she developed congestive heart
5 failure. She has had surgeries to remove blood clots from her
6 legs. She has poor circulation and edema--water retention--below
7 the skin of her legs resulting in painful swelling. She is prone
8 to rashes, as well. In the past, the edema and skin outbreaks
9 have led to open wounds and oozing sores. Ms. Stern underwent
10 skin grafting on her left leg to treat the problems. Through the
11 routine assistance provided by IHSS these problems have been
12 brought under control. Ms. Stern also suffers from chronic
13 inflammation of the bladder wall and frequent urinary tract
14 infections. She regularly experiences urinary incontinence.

15
16 Ms. Stern's IHSS provider gives assistance for bowel and
17 bladder care, bathing, oral hygiene and grooming. This assistance
18 is critical due, in part, to Ms. Stern's incontinence and serious
19 skin problems. Ms. Stern requires frequent undressing and
20 redressing due to her accidents, which occur several times per
21 week. Ms. Stern cannot wear diapers or incontinence pads during
22 the day because of her skin problems. The provider also prepares
23 three meals a day for Ms. Stern, assists her in her wheelchair,
24 takes her to medical appointments, and does the shopping and
25 household chores. Ms. Stern is authorized to receive 126.1 hours
26 of IHSS care per month, but since 2010, due to a 3.6 percent cut,
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1 she has received 121.6 hours of care per month, approximately four
2 hours per day, seven days per week. Ms. Stern's provider,
3 however, normally stays five hours per day, even though she is
4 paid only for four hours. The provider works two shifts, one in
5 the morning and another in the evening.

6 A twenty percent reduction in Ms. Stern's IHSS hours would
7 undermine her ability to maintain a hygienic and healthy home and
8 to keep her skin problems under control. If Ms. Stern's IHSS
9 hours are cut by twenty percent, her provider will likely need to
10 find another job, interfering with her ability to work two shifts
11 and provide a free hour of service each day.

12 Plaintiffs allege eight claims in their Third Amended
13 Complaint. The first claim alleges that the notices Defendants
14 propose to send to IHSS recipients are inadequate under
15 constitutional due process standards. The second claim alleges
16 that ABX4 4 and SB 73 deprive IHSS recipients of their right to
17 notice and a pre-termination hearing in violation of the provision
18 of the Medicaid Act establishing right to a fair hearing. The
19 third and fourth claims allege that ABX4 4 and SB 73 violate the
20 Americans with Disabilities Act (ADA) and section 504 of the
21 Rehabilitation Act of 1973, respectively. The fifth, sixth and
22 seventh claims allege that both state enactments violate the
23 comparability, sufficiency and reasonable standards requirements
24 of the Medicaid Act.
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LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

Alternatively, "a preliminary injunction could issue where the likelihood of success is such that serious questions going to the merits were raised and the balance of hardships tips sharply in plaintiff's favor," so long as the plaintiff demonstrates irreparable harm and shows that the injunction is in the public interest. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011) (citation and internal quotation and editing marks omitted).

A court employs a sliding scale when considering a plaintiff's showing as to the likelihood of success on the merits and the likelihood of irreparable harm. Id. "Under this approach, the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." Id.

DISCUSSION

I. Likelihood of Success on the Merits

A. Standing

Defendants contend that all Plaintiffs lack standing. In every federal case, the court must make a threshold determination of standing. Warth v. Seldin, 422 U.S. 490, 498 (1975). "The question of standing 'involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.'" Bennett v. Spear, 520 U.S. 154, 162 (1997) (quoting Warth, 422 U.S. at 498). To satisfy the case or controversy requirement of Article III, which is the "irreducible constitutional minimum" of standing, a plaintiff must have suffered (1) an injury in fact, (2) that is fairly traceable to the actions of the defendant, such that (3) if a favorable court decision were rendered, it is likely the injury would be redressed. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). An "injury in fact" is more than an injury to a cognizable interest; to satisfy this requirement, the injury must be concrete and particularized. Id. According to the Lujan court, "particularized" means that the injury must have affected the plaintiff "in a personal and individual way." Id. at 560 n.1.

In addition to the immutable, constitutional requirements of Article III, "the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing." Valley Forge v. Americans United, 454 U.S. 464, 474-75 (1982).

1 Among these prudential limits is the doctrine that a plaintiff's
2 grievance must arguably fall within the zone of interests
3 protected or regulated by the statute invoked in the suit. Allen
4 v. Wright, 468 U.S. 737, 751 (1984); Valley Forge, 454 U.S. at
5 474-75. Another prudential limit is the principle that the
6 plaintiff "generally must assert his own legal rights and
7 interests, and cannot rest his claim to relief on the legal rights
8 or interests of third parties." Warth, 422 U.S. at 499.

10 Where one party has standing to pursue the claims at issue, a
11 court need not separately analyze whether other parties have
12 standing to sue. Brown v. City of Los Angeles, 521 F.3d 1238,
13 1240 n.1 (9th Cir. 2008) ("[T]he presence in a suit of even one
14 party with standing suffices to make a claim justiciable."); Bates
15 v. United Parcel Serv., Inc., 511 F.3d 974, 985 (9th Cir. 2007)
16 (en banc) ("[W]e consider only whether at least one named
17 plaintiff satisfies the standing requirements").

19 First, Defendants argue that named Plaintiffs Oster, Jones,
20 C.R. and L.C. lack standing to pursue any of their claims because
21 they are exempt from SB 73's reduction in hours. Plaintiffs agree
22 that Plaintiffs Oster, Jones and C.R. lack standing with respect
23 to the claims based on SB 73. However, Plaintiffs Oster, Jones
24 and C.R. have standing to pursue claims based on ABX4 4.

26 Defendants assert that L.C. lacks standing as an individual
27 and as a representative of a subclass pursuing claims on behalf of
28 present or future IHSS recipients who are under the age of twenty-

1 one, who are entitled to the protections of the Early Periodic
2 Screening Diagnosis and Treatment (EPSDT) provisions, and have or
3 will receive notice of service cuts pursuant to SB 73. Eileen
4 Carroll, Deputy Director of the Adult Programs Division of the
5 CDSS, attested that all IHSS recipients who receive EPSDT services
6 are pre-approved for exemption from the reduction in services.
7 However, Ms. Carroll's declaration was drafted for purposes of
8 this litigation. There is no indication that the EPSDT exemption
9 is legally binding on the counties by virtue of statutory or
10 regulatory law or otherwise. Therefore, it appears that L.C. may
11 be subject to cuts based on SB 73 and has standing.
12

13 Defendants argue that the claims of named Plaintiffs Stern,
14 Thurman and Hylton are not ripe because they may request
15 restoration of their hours by applying for Supplemental Care.²
16 "[T]he possibility of future injury may be sufficient to confer
17 standing . . . [A] credible threat of harm is sufficient to
18 constitute actual injury for standing purposes." Cent. Delta
19 Water Agency v. United States, 306 F.3d 938, 946, 950 (9th Cir.
20 2002). Unless enjoined, the reductions here will be automatically
21 applied. Named Plaintiffs Stern, Thurman and Hylton will be
22 notified that their IHSS hours will be reduced. The injury is the
23 notice and reduction of IHSS hours, not the denial of a
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27 ² Defendants also make this argument with respect to named
28 Plaintiff Sheppard, but Plaintiffs no longer propose him as a
class representative. Docket No. 195.

1 recipient's request for restoration of hours. Defendants rely
2 upon Summar H. v. Fukino, 2009 WL 1249306 (D. Haw.), but that
3 decision is not binding on this Court and is not persuasive in
4 light of controlling Ninth Circuit authority.

5 The present dispute is appropriate for adjudication, even
6 under the standard for prudential ripeness that Defendants cite:
7 (1) the fitness of the issues for judicial decision; and (2) the
8 hardship to the parties of withholding court consideration. See
9 Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433
10 F.3d 1199, 1211 (9th Cir. 2006). Plaintiffs' challenge to cuts
11 mandated by SB 73 is not abstract. The fact that some
12 Supplemental Care applications may be granted to restore hours for
13 individual IHSS recipients does not defeat the ripeness of the
14 dispute Plaintiffs have presented.

15
16 Next, Defendants argue that Union Plaintiffs lack Article III
17 standing. Union Plaintiffs respond that they satisfy the
18 requirements for associational standing. "[A]n association has
19 standing to bring suit on behalf of its members when: (a) its
20 members would otherwise have standing to sue in their own right;
21 (b) the interests it seeks to protect are germane to the
22 organization's purpose; and (c) neither the claim asserted nor the
23 relief requested requires the participation of individual members
24 in the lawsuit." Hunt v. Wash. State Apple Adver. Comm'n, 432
25 U.S. 333, 343 (1977).
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Defendants assert that Union Plaintiffs have not established that any of their members would have standing to sue in their own right. However, Laura Soto is a member of Plaintiff United Domestic Workers of America, AFSCME, Local 3930, AFL-CIO (UDW), and provides IHSS services to named Plaintiff Hylton, who will receive a notice of a twenty percent reduction in her hours. Declaration of Laura Soto, Docket No. 481, at ¶¶ 1-2; Second Declaration of Gary Voice, Docket No. 485, at ¶ 19;³ Second Declaration of Andrea Hylton, Docket No. 371, at ¶ 22. Similarly, Katie Phillips, another UDW member, provides IHSS services to her adult son, who suffers from paranoid schizophrenia and depression. Declaration of Katie Phillips, Docket No. 393, at ¶¶ 2-3; Voice Dec. at ¶ 19. Ms. Phillips' son faces a twenty percent reduction in hours, which will adversely impact Ms. Phillips. Phillips Dec. at ¶ 22. Ms. Soto and Ms. Phillips have standing to sue in their own right because they will suffer economic harm as a result of the reductions. See Independent Living Ctr. v. Shewry, 543 F.3d 1050, 1065 (9th Cir. 2008) ("Petitioners include independent

³ The Soto and Voice declarations were submitted in support of Plaintiffs' reply brief. Defendants objected to the submission of new evidence in connection with the reply, but both declarations directly respond to standing issues that Defendants raised in their opposition. Furthermore, Defendants' specific objection to the Soto declaration did not address the testimony cited here. Defendants did not specifically object to the Voice Declaration, although they stated that they did not have sufficient time to review all of the declarations. Federal Rules of Evidence 402, 602, 701, 702 and 802 do not require the exclusion of Mr. Voice's testimony. Defendants' objections are overruled.

1 pharmacies and health care providers participating in the State's
2 Medi-Cal program that, according to their complaint, will be
3 'directly injured, by loss of gross income' when the ten-percent
4 rate reduction takes effect.").

5 Contrary to Defendants' argument, Union Plaintiffs' claims in
6 this litigation are also germane to their organizational
7 interests. Union Plaintiffs represent IHSS providers who are
8 seeking to prevent the reduction of IHSS benefits, which will, in
9 turn, lessen the amount of work available to their members. Union
10 Plaintiffs and IHSS recipients have a mutual interest in the
11 success of the litigation. From the beginning of this lawsuit,
12 the joint goal of all Plaintiffs has been to ensure that IHSS
13 recipients receive the services that they need to remain safely in
14 their homes.

15
16 The third factor under Hunt is satisfied because the
17 participation of individual members is not necessary in suits that
18 seek only prospective, injunctive relief, rather than damages.
19 United Food and Commercial Workers v. Brown Group, Inc., 517 U.S.
20 544, 554 (1996) (third Hunt prong precludes standing "when an
21 organization seeks damages on behalf of its members.");
22 International Union v. Brock, 477 U.S. 274, 287 (1986) (union has
23 standing to challenge government's interpretation of Trade Act,
24 where suit sought no damages and thus did not entail
25 "individualized proof."). Thus, Union Plaintiffs' members need
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1 not be joined as parties in order for Union Plaintiffs to have
2 associational standing.

3 Defendants, citing Hodgers-Durgin v. de la Vina, 199 F.3d
4 1037, 1045 (9th Cir. 1999), also argue that Union Plaintiffs lack
5 standing because the claims asserted and relief requested require
6 the demonstration of injury to a named union member Plaintiff.
7 Unlike the class in Hodgers, Plaintiffs in this case do not invoke
8 injury merely to unnamed Plaintiffs for the purpose of
9 establishing Article III standing. Furthermore, the Ninth Circuit
10 recently reiterated, "An organization may establish a sufficient
11 injury in fact if it substantiates by affidavit or other specific
12 evidence that a challenged statute or policy frustrates the
13 organization's goals and requires the organization 'to expend
14 resources in representing clients they otherwise would spend in
15 other ways.'" Comite de Jornaleros de Redondo Beach v. City of
16 Redondo Beach, 657 F.3d 936, 943 (9th Cir. 2011) (citing El
17 Rescate Legal Servs., Inc. v. Executive Office of Immigration
18 Review, 959 F.2d 742, 748 (9th Cir. 1992)). Union Plaintiffs have
19 submitted evidence to this effect. Declaration of David Werlin,
20 Docket No. 488, at ¶¶ 1-7; Second Voice Dec. at ¶¶ 1-19.⁴
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23

24 ⁴ Defendants' objections to this evidence are overruled.
25 Plaintiffs' reply evidence was submitted in direct response to the
26 standing issues Defendants raised in their opposition, and the
27 Court has considered and overruled the objections based on
28 evidentiary rules barring irrelevant testimony, hearsay testimony,
testimony lacking personal knowledge, and improper expert and
layperson testimony.

1 Defendants also argue that Union Plaintiffs lack prudential
2 standing because their claims are not within the "zone of
3 interests" protected by any of the laws on which Plaintiffs base
4 their claims. This argument also fails. The zone of interests
5 test "is not meant to be especially demanding; in particular,
6 there need be no indication of congressional purpose to benefit
7 the would-be plaintiff." Clarke v. Securities Indus. Ass'n, 479
8 U.S. 388, 399-400 (1987). "The proper inquiry is simply 'whether
9 the interest sought to be protected by the complainant is arguably
10 within the zone of interests to be protected . . . by the
11 statute.' . . . [W]e first discern the interests 'arguably . . .
12 to be protected' by the statutory provision at issue; we then
13 inquire whether the plaintiff's interests affected" by the action
14 in question are among them. National Credit Union Admin. v. First
15 Nat'l Bank & Trust Co., 522 U.S. 479, 492 (1998) (emphasis in
16 original) (citation omitted). "Prudential standing is satisfied
17 unless [the party's] interests are so marginally related to or
18 inconsistent with the purposes implicit in the statute that it
19 cannot reasonably be assumed that [the legislature] intended to
20 permit the suit." Stormans, Inc. v. Selecky, 586 F.3d 1109, 1122
21 (9th Cir. 2009) (quotation marks and citations omitted; brackets
22 in original).

23 Here, IHSS providers are within the zone of interests of the
24 Medicaid Act, the ADA and the Rehabilitation Act because the
25 services they provide are a critical component of the mandates and
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1 benefits established by those laws. Although Plaintiffs have not
2 cited cases holding that IHSS providers are within the zone of
3 interests of these statutes, several courts have come to a similar
4 conclusion in the context of persons who provide care subsidized
5 by the Social Security Act. See California Ass'n of Bioanalysts
6 v. Rank, 577 F. Supp. 1342, 1347 n.6 (C.D. Cal. 1983) ("While
7 Medicaid providers are clearly not the primary beneficiaries of
8 the Social Security Act . . . the majority view [is] that such
9 providers are arguably within the zone of interests protected
10 under the statute."); see also Edgewater Nursing Ctr., Inc. v.
11 Miller, 678 F.2d 716, 718 (7th Cir. 1982) (plaintiff providers
12 "have standing to challenge any feature of the state's plan that
13 violates the [Medicaid] statute to their detriment"); Minnesota
14 Ass'n of Health Care Facilities, Inc. v. Minnesota Dep't of Pub.
15 Welfare, 602 F.2d 150, 153 n.6 (8th Cir. 1979) ("Appellants, as
16 Medicaid providers, do have standing to challenge alleged
17 violations of the Social Security Laws."). Thus, under the
18 "arguably protected" standard, Union Plaintiffs are within the
19 zone of interests of the statutes at issue.

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22 In sum, although Union Plaintiffs need not establish standing
23 in their own right because the individual Plaintiffs have
24 standing, the Court concludes that Union Plaintiffs have satisfied
25 the standing requirements.
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B. Medicaid Act Claims

Defendants argue that the Court should defer ruling on the merits of Plaintiffs' reasonable standards and sufficiency claims under the Medicaid Act, pending the Supreme Court's resolution of an appeal certified to address whether Medicaid recipients and providers may maintain a cause of action under the Supremacy Clause to enforce provisions of the statute. In the order explaining the injunction against the implementation of ABX4 4, the Court relied on Ninth Circuit precedent, specifically Shewry, 543 F.3d at 1056-57, to find that Plaintiffs stated a claim under the Supremacy Clause, even though the Medicaid Act provision requiring reasonable standards is not privately enforceable under 42 U.S.C. § 1983. October 23, 2009 Order at 18-19. Defendants appealed the Court's preliminary injunction. On January 28, 2011, the Ninth Circuit withdrew submission of the case and deferred ruling on the appeal, pending the Supreme Court's decision in the consolidated appeals of Maxwell-Jolly v. Indep. Living Ctr., 572 F.3d 644 (9th Cir. 2009);⁵ Maxwell-Jolly v. Calif. Pharmacists Ass'n, 374 Fed. Appx. 690 (9th Cir. 2010); and Maxwell-Jolly v. Santa Rosa Mem. Hosp., 380 Fed. Appx. 656 (9th Cir. 2010). On February 23, 2012, the Supreme Court remanded the consolidated appeal to the Ninth Circuit due a change in the procedural posture

⁵ Maxwell-Jolly v. Indep. Living Ctr., 572 F.3d 644 (9th Cir. 2009), is a later appeal arising from the same case that produced the decision in Independent Living Ctr. v. Shewry, 543 F.3d 1050, 1065 (9th Cir. 2008).

of the cases and did not resolve the certified question.⁶ Douglas v. Independent Living Center of Southern California, Inc., Nos. 09-958, 09-1158, and 10-283, slip. op. at 5-8 (U.S.). The Court declines to defer a decision on Plaintiffs' request for a preliminary injunction, pending the Ninth Circuit's resolution of the appeal on remand.

1. Reasonable Standards Requirement

The Medicaid Act requires that all participating states use "reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives" of the program. 42 U.S.C. § 1396a(a)(17). The primary objectives of the Medicaid program are to provide medical assistance to individuals whose income and resources are insufficient to meet the costs of necessary medical services and to furnish "rehabilitation and other services to help such . . . individuals attain and retain capability for independence or self care." 42 U.S.C. § 1396-1.

⁶ The Supreme Court explained that to qualify for federal Medicaid funds, states must submit a state Medicaid plan that details the nature and scope of services in their state's Medicaid program for review and approval by the federal agency, Centers for Medicare & Medicaid Services (CMS). In addition, states must submit, from time to time, any amendments to the plan for approval. In October 2011, after the Supreme Court heard oral argument in Independent Living Center, CMS approved several of California's statutory amendments to the plan. The Supreme Court found that the procedural posture of the case had changed, such that respondent Medicaid providers and beneficiaries may be required to proceed under the Administrative Procedure Act, 5 U.S.C. § 701, et seq. On that basis, the Court remanded the appeal to the Ninth Circuit for further consideration.

1 Plaintiffs have demonstrated that they are likely to succeed
2 on their claim that SB 73 violates the reasonable standards
3 mandate of the Medicaid Act. The reduction in IHSS hours stems
4 from California's budget crisis as opposed to evidence that the
5 need for IHSS hours has been incorrectly evaluated. It is true
6 that California is experiencing a budget crisis. Although
7 budgetary needs may be considered in determining that service cuts
8 are required, it may not be the sole reason for the reduction.
9
10 See Independent Living Center, 572 F.3d at 656 ("the State's
11 decision to reduce Medi-Cal reimbursement rates based solely on
12 state budgetary concerns violated federal law."); Beno v. Shalala,
13 30 F.3d 1057, 1069 n.30 (9th Cir. 1994). Defendants assert that
14 the implementation of the cuts is reasonable in that specific
15 groups of recipients are exempt because "they are categorically at
16 serious risk of out-of-home placement as a result of the
17 reduction." ACL at 4.

18
19 However, certain IHSS recipients will be cut back to twenty
20 percent fewer hours for reasons unrelated to need. These IHSS
21 recipients are not in an exempt or pre-approved group and will
22 receive a notice of action, even though they are presumptively at
23 serious risk of out-of-home placement. Only if these seriously
24 at-risk recipients submit a Supplemental Care application will
25 they be considered for a restoration of needed service hours. In
26 this respect, eligibility for services is determined, not by a
27 reasonable need-based standard, but by the ability of seriously
28

1 at-risk recipients to request in a timely manner a restoration of
2 their hours. The CDSS could readily identify many of these
3 seriously at-risk recipients, just as they have done with the
4 exempt and pre-approved groups, because the determination that
5 they are seriously at risk is based on information contained in
6 CMIPS. Thus, even if rote reliance on functional ranks were a
7 reasonable basis to determine need, Defendants' implementation
8 plan is likely to be found unreasonable. Defendants' plan would
9 deliberately cut services for IHSS recipients who are already
10 known to be presumptively eligible for a restoration of their lost
11 hours, should they protest the twenty percent reduction by
12 applying for Supplemental Care. Defendants seemingly expect the
13 State will save funds by cutting the service hours of those who
14 are unable to protest the hours reduction.
15

16 2. Comparability Requirement

17 The "comparability" requirement of the Medicaid Act mandates
18 comparable services for individuals with comparable needs; it is
19 violated when some recipients are treated differently than others
20 with the same level of need. 42 U.S.C. § 1396a(a)(10)(B); see
21 also 42 C.F.R. § 440.240; Jenkins v. Washington State Dep't of
22 Social & Health Servs., 160 Wash. 2d 287, 296-97 (2007); Sobky v.
23 Smoley, 855 F. Supp. 1123, 1139 (E.D. Cal. 1994) (comparability
24 requirement "creates an equality principle" for all medically
25 needy individuals); Schott v. Olszewski, 401 F.3d 682, 688-89 (6th
26 Cir. 2005); White v. Beal, 555 F.2d 1146, 1151-52 (3d Cir. 1977).
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1 A state may "place appropriate limits on a service based on such
2 criteria as medical necessity or on utilization control
3 procedures." 42 C.F.R. § 440.230(c)(2). However, a state may not
4 "arbitrarily deny or reduce the amount, duration, or scope of a
5 required service . . . to an otherwise eligible recipient solely
6 because of the diagnosis, type of illness, or condition." 42
7 C.F.R. § 440.230(c)(1).

8
9 Defendants argue that SB 73 does not violate the
10 comparability requirement because the exempted and pre-approved
11 groups that categorically escape the twenty percent reduction are
12 identified using objective, needs-based criteria, and recipients
13 who receive the notice of action are afforded an opportunity to
14 seek individualized review. Plaintiffs counter that the
15 comparability requirement is violated because the use of
16 functional ranks to determine service hours will result in
17 recipients with comparable needs receiving different levels of
18 IHSS. As the Court explained in its October 23, 2009 order, the
19 use of functional ranks to determine eligibility for services
20 likely violates the comparability requirement because it does not
21 reasonably measure the individual need of a disabled or elderly
22 person for a particular service. October 23, 2009 Order at 12-13.
23 The functional rank of two, which recognizes a need for verbal
24 assistance, compared to the ranks of three, four and five,
25 reflects the nature of the assistance needed, not the severity of
26 the need. For example, a person with a cognitive disorder may
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1 only require verbal reminders or encouragement to eat and or take
2 her medications, but the absence of such assistance could have a
3 dramatic, negative impact on the recipient's health and ability to
4 live safely at home.

5 Furthermore, it is likely that some recipients who are
6 seriously at-risk for out-of-home placement and receive notice of
7 the reduction will not be able timely to complete a Supplemental
8 Care application. Thus, the reductions will go into effect for
9 them. Yet, recipients with comparable or lesser needs who are
10 able to and do request Supplemental Care may preserve their hours
11 of service. A violation of the comparability requirement is
12 likely to result from the automatic imposition of the twenty
13 percent reduction on those IHSS recipients who do not apply for
14 Supplemental Care before the deadline.

15
16 As noted above, while recipients in State Home and Community
17 Based Services waiver programs are exempt from the cut, recipients
18 who qualify for these programs but are on waiting lists are not
19 exempt. Defendants argue that Congress has waived the
20 comparability requirement with respect to these programs by
21 allowing states to provide specific services to certain targeted
22 populations. See 42 U.S.C. § 1396n(c). This does not permit the
23 State to violate the comparability mandate by cutting the basic
24 services for some recipients with the same diagnoses and needs.
25 IHSS recipients on the waiting lists who are eligible for the
26 waiver programs should be eligible for the exemption granted to
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1 those in the programs. The failure to exempt such recipients
2 likely violates the comparability mandate.

3 Under the plan to implement SB 73, the differences in IHSS
4 hours authorized for those who are exempted or pre-approved,
5 compared to those are presumptively eligible for a restoration of
6 hours, but fail to apply for it, are due to the CDSS's decision
7 not to identify seriously at-risk recipients prior to subjecting
8 them to a twenty percent reduction and, instead, to require such
9 individuals to submit a Supplemental Care application. Therefore,
10 Plaintiffs are likely to succeed on their comparability claim.

12 3. Sufficiency Requirement

13 The regulations implementing the Medicaid Act contain a
14 "sufficiency" requirement, which mandates, "Each service must be
15 sufficient in amount, duration, and scope to reasonably achieve
16 its purpose." 42 C.F.R. § 440.230(b). When a state commits to
17 provide a Medicaid service, the sufficiency requirement ensures
18 that it adequately fulfills its commitment.

19 Defendants first argue that federal regulation 42 C.F.R.
20 § 440.230(b) cannot provide the basis for Plaintiffs' sufficiency
21 claim. However, as the Court noted in its October 2009 order,
22 federal regulations may carry preemptive force, see, e.g., Geier
23 v. American Honda Motor Co., 529 U.S. 861, 884-86 (2000), and, as
24 such, they may provide a cause of action for injunctive relief
25 under the Supremacy Clause.
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1 The IHSS hours authorized for recipients are those that the
2 State has determined to be necessary to permit the recipients to
3 remain safely in their homes. MPP § 30-761.1. As a result, the
4 twenty percent reduction in these services will likely leave
5 affected individuals without a level of service sufficient to
6 achieve the purpose of the program.

7
8 The Supplemental Care application does not alter this likely
9 outcome because the review process occurs only after recipients
10 submit an application by the deadline. It is probable that some
11 recipients will not be able to apply and that some who need
12 restoration of IHSS hours will attempt to cope with the reduction,
13 allowing the deadline to pass before realizing the full impact of
14 the reduced hours.

15
16 The State concedes that the test it will use to restore hours
17 pursuant to the Supplemental Care application--hours necessary to
18 avoid serious risk of out-of-home placement--is identical to the
19 standard for the authorization of IHSS hours that was used in the
20 first place--necessary for the IHSS recipient to remain safely at
21 home. Nonetheless, the Supplemental Care worksheet demonstrates
22 that IHSS recipients who do not meet the test in Parts A or B of
23 the worksheet, because they have functional ranks that entail only
24 verbal or some human assistance to complete certain functions,
25 will not be eligible for a restoration of their reduced IHSS
26 hours. Based on their functional ranks, IHSS recipients will be
27 deprived of hours that the State has previously determined are
28

1 necessary for them to remain safely at home. The worksheet
2 requires a mechanistic calculation that leaves no opportunity to
3 consider individual need that may exist in spite of a recipient's
4 seemingly disqualifying functional ranks. The only individualized
5 determination allowed is to cut the hours for which an IHSS
6 recipient would otherwise be eligible, if he or she can manage
7 some other way. The Supplemental Care application process
8 exacerbates the fact that functional ranks are not an accurate
9 measure of need in the first place, because functional ranks
10 indicate the nature of the assistance, rather than the importance
11 of the need for the assistance to ensure that the recipient is
12 able to remain safely at home.

14 Plaintiffs have demonstrated a likelihood of succeeding on
15 the merits of their claim that SB 73 imposes cuts that will
16 deprive IHSS recipients of IHSS hours sufficient to ensure that
17 they are able to remain safely at home.

19 C. ADA and Rehabilitation Act Claims

20 The ADA and the Rehabilitation Act prohibit discrimination
21 based on disability. 42 U.S.C. § 12132; 29 U.S.C. § 794(a).
22 Unnecessary isolation is a form of discrimination against people
23 with disabilities. As the Supreme Court has explained,
24 "unjustified isolation" of the disabled amounts to discrimination
25 because institutional placement "perpetuates unwarranted
26 assumptions that persons so isolated are incapable or unworthy of
27 participating in community life" and "severely diminishes everyday
28

1 life activities of individuals, including family relations, social
2 contacts, work options, economic independence, educational
3 advancement, and cultural enrichment." Olmstead v. L.C. ex rel.
4 Zimring, 527 U.S. 581, 597, 600-01 (1999). Thus, both the ADA and
5 the Rehabilitation Act contain an "integration mandate" which
6 "serves one of the principal purposes of Title II of the ADA:
7 ending the isolation and segregation of disabled persons." Arc of
8 Washington State v. Braddock, 427 F.3d 615, 618 (9th Cir. 2005).
9 States are required to provide care in integrated environments for
10 as many disabled persons as is reasonably feasible, so long as
11 such an environment is appropriate to their health needs.
12 Specifically, the ADA regulations provide: "A public entity shall
13 administer services, programs, and activities in the most
14 integrated setting appropriate to the needs of qualified persons
15 with disabilities." 28 C.F.R. § 35.130(d). "The 'most integrated
16 setting' is defined as 'a setting that enables individuals with
17 disabilities to interact with non-disabled persons to the fullest
18 extent possible.'" Brantley, 2009 WL 2941519, at *6 (citing 28
19 C.F.R. pt. 35 app. A; Olmstead, 527 U.S. at 592). Plaintiffs who
20 currently reside in community settings may assert ADA integration
21 claims to challenge state actions that give rise to a risk of
22 unnecessary institutionalization. See Fisher v. Oklahoma Health
23 Care Auth., 335 F.3d 1175, 1181-82 (10th Cir. 2003).

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27 Defendants assert that Plaintiffs are unlikely to succeed
28 because they do not have Article III standing to pursue their ADA

1 claim. Defendants assert that individual Plaintiffs have failed
2 to demonstrate injury under Article III because they have not
3 shown that they are at imminent risk of institutionalization. For
4 the reasons explained above, Plaintiffs have Article III standing
5 because they face a "credible threat" of harm in that they are
6 likely to face a twenty percent reduction in their IHSS service
7 hours. See Cent. Delta Water Agency, 306 F.3d at 946. Defendants
8 confuse the constitutional standing requirement of injury in fact
9 with the merits of Plaintiffs' claim that SB 73 unlawfully creates
10 a risk of unnecessary institutionalization. The record
11 demonstrates the likelihood that IHSS recipients who are
12 presumptively eligible for a restoration of hours will not have
13 their hours restored because they will be unable timely to submit
14 a request for Supplemental Care. The evidence also shows that
15 Plaintiffs are likely to succeed in demonstrating that the loss of
16 IHSS hours will compromise the health and well-being of IHSS
17 recipients such that they will be at serious risk of
18 institutionalization.⁷ M.R. v. Dreyfus, 663 F.3d 1100, 1116 (9th
19 Cir. 2011) ("An ADA plaintiff need not show that
20 institutionalization is 'inevitable' or that she has 'no choice'
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25 ⁷ Defendants' objections to IHSS recipients' testimony about
26 the health risks posed by the twenty percent reduction in IHSS
27 hours are overruled. The declarants have personal knowledge of
28 the likely impact that the lost hours will have on their health
and their ability to remain safely at home based on their personal
knowledge of their own health status and past experiences.

1 but to submit to institutional care in order to state a violation
2 of the integration mandate.").

3 Defendants also argue that Plaintiffs' claim that the ADA and
4 Rehabilitation Act require the continuation of IHSS hours for
5 certain individuals amounts to impermissible commandeering under
6 the Tenth Amendment. This argument is foreclosed by Lovell v.
7 Chandler, 303 F.3d 1039 (9th Cir. 2002). There the Ninth Circuit
8 rejected the argument that Congress exceeded its Spending Clause
9 powers and the conditions set forth in South Dakota v. Dole, 483
10 U.S. 203 (1987), when it approved section 504 of the
11 Rehabilitation Act, 29 U.S.C. § 794(a). Id. at 1051. The court
12 reasoned that Congress has a strong interest in ensuring that
13 federal funds are not used in a discriminatory manner and in
14 holding states responsible when they violate funding conditions.
15 Id. The court also found an inadequate showing of "extraordinary
16 circumstances . . . that would allow us to hold that Congress
17 exceeded constitutional boundaries." Id. (internal citations
18 omitted).

19 Finally, Defendants have not established that the integration
20 mandate is limited to deterring the unjustified isolation of
21 disabled individuals in twenty-four-hour residential nursing care
22 centers.

23 Plaintiffs have established their likelihood of success on
24 the merits of their claims under the ADA and the Rehabilitation
25 Act.
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1 D. Due Process Claims

2 When parties are threatened with the loss of a protected
3 property interest, due process under the Fourteenth Amendment
4 requires that a state must provide "notice reasonably calculated,
5 under all the circumstances, to apprise interested parties of the
6 pendency of the action and afford them an opportunity to present
7 their objections." See Mullane v. Central Hanover Bank & Trust
8 Co., 339 U.S. 306, 314-15 (1950). IHSS recipients must receive
9 "timely and adequate notice detailing the reasons" for the adverse
10 action and "an effective opportunity to defend" themselves.
11 Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970). To comport with
12 due process, notice must be "tailored to the capacities and
13 circumstances" of the recipients who must decide whether to
14 request a hearing. Id. at 268. "The government must consider
15 unique information about an intended recipient regardless of
16 whether a statutory scheme is reasonably calculated to provide
17 notice in the ordinary case." Jones v. Flowers, 547 U.S. 220, 221
18 (2006).
19
20

21 Plaintiffs are likely to show that notice of the reductions
22 is not reasonably calculated to inform IHSS recipients. The
23 explanation letter is deficient in several respects. The letter
24 does not use simple language. It uses small print, and a font and
25 formatting that undermine the letter's readability. Declaration
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1 of Gavin Huntley-Fenner, Ph.D., at ¶¶ 14-17.⁸ Relying on the
2 results of various readability tests, among other things, Dr.
3 Huntley-Fenner opined that the information contained in the letter
4 was presented at a level of reading difficulty well above that of
5 many adult beneficiaries of Medi-Cal, California's Medicaid
6 program. The plan fails to provide for any method of notification
7 other than written. Thus, Plaintiffs are likely to demonstrate
8 that the explanation letter is not reasonably calculated to inform
9 IHSS recipients who have visual and cognitive disabilities, or
10 read at a lower level or not at all.

12 Furthermore, the letter does not specifically address how to
13 access translations of the notices and forms or even state that
14 they are available. The IHSS recipient population includes people
15 who cannot read English, Spanish, Armenian or Chinese. Therefore,
16 the letter is not reasonably calculated to provide notice to the
17 linguistically diverse population of IHSS recipients.

19 The letter erroneously states that section 12301.07 of the
20 California Welfare and Institutions Code requires a twenty percent
21 reduction of each IHSS recipient's service hours, without noting

22 ⁸ The Court overrules Defendants' evidentiary objection to
23 Dr. Huntley-Fenner's testimony that it amounts to improper expert
24 opinion. Dr. Huntley-Fenner's declaration establishes his
25 qualifications as expert witness. Furthermore, his consideration
26 of facts that underlie his opinions as to the readability of
27 Defendants' notices and his opinions themselves do not amount to
28 statements on the ultimate legal issue of whether the notices were
adequate under due process standards. Fed. R. Evid. 704 ("An
opinion is not objectionable just because it embraces an ultimate
issue.")

1 the exceptions, and could be read to suggest that the twenty
2 percent reduction will end on June 30, 2012.

3 The letter does not state in a plain and forthright manner
4 that Supplemental Care amounts to the restoration of lost hours.
5 It does not explain in a simple manner each enclosed form, or
6 include step-by-step instructions for completing and mailing the
7 necessary forms. A recipient could fail to understand that the
8 Supplemental Care application must be submitted immediately and
9 that the form to request a hearing is submitted only if the former
10 is denied and the recipient wishes to protest the denial. The
11 letter further states that requests for a hearing only to dispute
12 the new law requiring the twenty percent reduction will be dismissed,
13 which could confuse or mislead a recipient to believe that the hearing
14 is not an opportunity to appeal the twenty percent reduction of his or
15 her own service hours that resulted from the law. Although the
16 letter states that a recipient may contact his or her county IHSS
17 office for further information, it does not identify the relevant
18 contact person or phone number to call.
19

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21 Finally, the Supplemental Care application is inadequate.
22 The application requires recipients to explain why they require
23 the restoration of their hours but does not mention functional
24 ranks. This suggests that the CDSS will consider the written
25 explanation as the basis for the decision to restore hours. IHSS
26 recipients are not informed of the role of functional ranks in the
27 determination of whether IHSS hours will be restored or of their
28

1 own disqualifying functional ranks. These omissions and
2 misleading statements leave IHSS recipients uninformed of the
3 actual reason for the decision to reduce their hours and unable to
4 rebut it effectively.

5 Defendants assert that Jones, 547 U.S. at 200, and Covey v.
6 Town of Somers, 351 U.S. 141 (1956), are inapposite because they
7 address the manner of notice, rather than content. This
8 distinction is immaterial. Jones involved the sale of property by
9 the state due to the owner's tax delinquency and the adequacy of
10 notice to the owner. The state had mailed a certified letter in
11 an attempt to notify the owner of the tax delinquency, but the
12 notice was returned as unclaimed. Citing Mullane, the Court
13 reasoned that the means employed to give notice "must be such as
14 one desirous of actually informing" the individual entitled to
15 notice. The content of the State's notice, as well as the manner
16 of its delivery, may evidence the State's desire actually to
17 inform the IHSS recipients of the way to escape the twenty percent
18 reduction.
19
20

21 Plaintiffs have demonstrated that they are likely to succeed
22 on their due process claims.

23 II. Irreparable Harm, Balance of Hardships and the Public Interest

24 As the Court noted in its first preliminary injunction order,
25 numerous federal courts have recognized that the reduction or
26 elimination of public medical benefits irreparably harms the
27
28

1 participants in the programs cut. October 23, 2009 Order at 26.

2 See also, M.R., 663 F.3d at 1108-1115.

3 The substantial evidence submitted by Plaintiffs, as
4 exemplified by Mr. Thurman's and Ms. Stern's declarations,
5 demonstrates the likelihood of irreparable harm resulting from the
6 reduction in IHSS hours. Plaintiffs like these have shown that
7 the reduction in services, including domestic services, places
8 their health in jeopardy, such that they are more likely to fall
9 and injure themselves, eat less healthily or live in unhygienic
10 conditions. These unhealthy conditions increase the risk that
11 they will be unable to live safely at home and instead will be
12 institutionalized.

13
14 Because Defendants' interests are strictly fiscal and
15 Plaintiffs' interests affect their health, well-being and ability
16 to remain safely at home, the equities clearly weigh in favor of
17 Plaintiffs. M.R., 663 F.3d at 1120 (stating that the Ninth
18 Circuit has "several times held that the balance of hardships
19 favors beneficiaries of public assistance who may be forced to do
20 without needed medical services over a state concerned with
21 conserving scarce resources.").

22
23 In fact, the deprivation of essential services to the
24 disabled is part of the assessment of the public interest at
25 stake. Lopez v. Heckler, 713 F.2d 1432, 1437 (9th Cir. 1983).
26 Further, Plaintiffs have demonstrated that IHSS is likely to be
27 cost-effective as compared to the expenses incurred when disabled
28

1 and elderly individuals are institutionalized. See e.g. Kline
2 Decl., Docket No. 31, Ex. G at 7, Table 2; Second Declaration of
3 Dionne Jimenez, Docket No. 373, at ¶¶ 3-7. This evidence further
4 supports that the balance of equities and public interest weighs
5 in favor of Plaintiffs. M.R., 663 F.3d at 1120 ("Plaintiffs have
6 advanced such evidence . . . showing that if program beneficiaries
7 currently treated in their homes transition to more costly
8 institutional care, the state will not realize its anticipated
9 savings.").

11 In addition to establishing a likelihood of success on the
12 merits, Plaintiffs have demonstrated their likelihood of
13 irreparable harm, that the balance of equities weighs in their
14 favor, and that an injunction serves the public interest.

15 CONCLUSION

16 Because Plaintiffs have demonstrated a likelihood of success
17 on the merits and irreparable harm, such that the equities weigh
18 in their favor, their request for a preliminary injunction is
19 granted. The injunction will issue in a separate order. The
20 Court recognizes California's continuing budget crisis, and will
21 not foreclose all reductions of IHSS hours. The State may cut
22 IHSS hours if unnecessary hours are being compensated, but may not
23 impose cuts mechanistically and then determine the actual needs
24 thereafter. And, the State must give adequate notice to IHSS
25 recipients of the reasons for the reduction of their authorized
26 service hours, and of their remedies.

1 At the hearing on the motion for a preliminary injunction,
2 the Court asked the parties to meet and confer and attempt to
3 agree on proposed terms for an injunction that would remedy the
4 defects the Court found, in the most effective and least intrusive
5 way. The parties have not reached agreement. Nonetheless, the
6 Court would entertain such proposals to modify the injunction.

7
8 The Court exercises its discretion to waive the bond
9 requirement for Plaintiffs because they are indigent and to ensure
10 their ability to access the courts on behalf of themselves and
11 other class members. See Save Our Sonoran, Inc. v. Flowers, 408
12 F.3d 1113, 1126 (9th Cir. 2005); Walker v. Pierce, 665 F. Supp.
13 831, 844 (N.D. Cal. 1987).

14 IT IS SO ORDERED.

15
16
17 Dated: 3/2/12



CLAUDIA WILKEN
United States District Judge